

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GOVERNMENT OF THE VIRGIN ISLANDS,) DEPARTMENT OF EDUCATION,) Plaintiff,) v.) AMERICAN FEDERATION OF TEACHERS) ("AFT") o/b/o LEROY HEYWOOD and) RASHELD BOUGH,) Defendant.)	CIVIL NO. SX-13-CV-492 ACTION FOR DECLARATORY JUDGMENT AND TO VACATE ARBITRATOR'S AWARD
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MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Motion to Dismiss and Memorandum of Law in Support (Motion) of Defendant American Federation of Teachers (AFT) o/b/o Leroy Heywood and Rasheld Bough (Grievants), filed May 28, 2015; Plaintiff Government of the Virgin Islands, Department of Education (DOE)'s Opposition, filed June 23, 2015; and Defendant's Reply, filed July 27, 2015.¹ For the reasons that follow, Defendant's Motion will be granted.

BACKGROUND

Grievants Leroy Heywood and Rasheld Bough filed grievances against DOE on February 29, 2012 upon being notified by DOE that they were being "dismissed," effective March 9, 2012, from their positions as Electronic Technician and Offset Technician, respectively, on account of the "government's lack of funds." Complaint, ¶¶ 3, 6; Exhibit B, at 1. Grievants challenged their terminations as violative of the Collective Bargaining Agreement (CBA) between the parties, and sought reinstatement with compensation for all lost wages and benefits. *Id.* Grievants received partial relief in grievance decisions issued April 3, 2012, which determined that Grievants had not received full notice of termination of two bi-weekly pay periods as required by the CBA. However, all other relief sought was denied. On behalf of Grievants, AFT appealed both grievance decisions to arbitration. Grievants' disputes were arbitrated on August 16, 2013, before Arbitrator Lewis G. Brewer, following which both parties submitted post-arbitration briefs. Complaint ¶¶ 6, 9, Exhibit B, at 2. Arbitrator's Opinion and Award (Award), issued October 1, 2013, determined that DOE had violated sections of the CBA and that Grievants were "entitled to be made whole based upon DOE's

¹ On March 27, 2013, AFT filed Defendant's Motion to Dismiss in Lieu of an Answer, substantively similar to the motion addressed herein. That 2013 motion was ostensibly served on counsel for DOE, which has filed no response. The Court, which did not rule on the 2013 motion, treats that motion as subsumed into the present Motion.

violation of their contractual rights.” *Id.* at 11. DOE filed this action to vacate the Award on December 20, 2013, served on AFT on February 7, 2014. Motion, at 3; Exhibit B.² By its Motion, AFT seeks dismissal of DOE’s Complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that it was untimely filed according to the statutory limitation period for filing an action to vacate an arbitration award set forth in Section 12 of the Federal Arbitration Act (FAA) (9 U.S.C. § 12).

LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 12(b)(6), applicable to the Superior Court through Super. Ct. R. 7, a defendant may seek dismissal for failure to state a claim upon which relief can be granted, by asserting an affirmative Fed. R. Civ. P. 8(c) defense, such as lack of compliance with an applicable statute of limitations. The Supreme Court of the Virgin Islands has confirmed that statutes of limitation are presumptively non-jurisdictional, claims processing statutes, and that accordingly, a statute of limitations defense may be waived if not timely asserted by a defendant or equitably modified by a court. *See Brady v. Cintron*, 55 V.I. 802, 817 n. 15 (V.I. 2011). In response to a successfully asserted statute of limitations affirmative defense, “the Superior Court should [] enter[] its dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) [for failure to state a claim upon which relief can be granted,] rather than Rule 12(b)(1) [for lack of subject-matter jurisdiction].” *Id.* (citing *Martinez v. Colombian Emeralds*, 51 V.I. 174, 189 (V.I. 2009) (explaining that affirmative defenses arise under Rule 12(b)(6), not Rule 12(b)(1), and thus may not be raised by Superior Court *sua sponte*, but must be timely asserted as an initial responsive pleading to a complaint).

DISCUSSION

AFT argues that DOE’s Complaint must be dismissed, as untimely filed pursuant to Section 12 of the FAA. Motion, at 3. Section 12 of the FAA provides:

Notice of a motion to vacate, modify, or correct an award *must be served* upon the adverse party or his attorney *within three months* after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to

² On May 12, 2015, AFT filed an Action to Confirm An Arbitration Award (SX-15-CV-178). That action has been dismissed by Memorandum Opinion and Order entered this date, in response to DOE’s Motion to Dismiss, filed October 16, 2015, opposed by AFT December 17, 2015.

stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 12 (emphasis added).

The Award was issued October 1, 2013. DOE filed this action December 20, 2013 and served AFT on February 7, 2014. *Id.* at 2-3. AFT argues that DOE was required to serve AFT with notice of its action to vacate the Award “within three months after the award is filed,” or by January 1, 2014. *Id.* at 5.³

Federal Arbitration Act applies to this dispute arising from the CBA

The initial inquiry is whether the provisions of the FAA are applicable to the parties’ CBA and the dispute in issue. Under the FAA, “a written provision in any [] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

The Supreme Court of the Virgin Islands has expressed reservations concerning the application of the FAA to disputes in the Virgin Islands. In *dicta*, the Supreme Court has opined that no interstate nexus would exist to trigger application of the FAA to an arbitration clause contained in a collective bargaining agreement “executed between a Virgin Islands governmental department and a Virgin Islands union on behalf of workers residing in the Virgin Islands who provide services in Virgin Islands correctional facilities.” *Gov't of the V.I. v. United Indus., Svc., Transp., Prof. & Gov't Workers of N.A.*, 64 V.I. 312, 321 n.3 (V.I. 2016) In an earlier case, the Supreme Court similarly espoused a narrow view of the interstate commerce nexus, noting that it was presented with no evidence or argument from which it could conclude that an “employment agreement between Allen,

³ Section 12 of the FAA specifies that “notice of a motion to vacate... must be served” within three months after the award is filed. The parties effectively concede that the “motion” referenced in the statute is equivalent to the Complaint herein, and that the “notice” required was here accomplished through service of process on AFT of DOE’s Complaint and Summons, effectuated pursuant to Fed. R. Civ. P. 4. See Motion, at 5-6; Opposition, at 2. See also, e.g. *Belz v. Morgan Stanley Smith Barney, LLC*, 2014 U.S. Dist. LEXIS 28906, *6 (Md. 2014) (in which an Application to Vacate was the equivalent of a Motion to Vacate); *Domnarski v. UBS Fin. Servs., Inc.*, 919 F. Supp. 2d 183, 184 (D. Mass. 2013) (treating a complaint as a motion to vacate an arbitration award); cf. *W. Emp’r Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258, 261 (9th Cir. 1992) (holding that a district court should have construed a petition to vacate as notice of a motion to vacate within the meaning of 9 U.S.C. § 12 because “nomenclature is not controlling” and finding that a timely notice of motion to vacate and an untimely motion to vacate - together met the requirements of 9 U.S.C. § 12); *Watermill Ventures, Lrd. v. Cappello Capital Corp.*, 2015 U.S. Dist. LEXIS 9185, *11 (C.D. Cal. 2015) (“to prevent these proceedings from being treated as a full-blown civil action contrary to the FAA’s purpose, the Court construes Watermill’s complaint as a motion to vacate the arbitration award, and Cappello’s motion to dismiss as an opposition thereto”).

a Virgin Islands resident, and Wyatt, a Virgin Islands corporation that provides services exclusively at an oil refinery located in the Virgin Islands, affects interstate commerce.” *Allen v. Hovenssa, L.L.C.*, 59 V.I. 430, 443 n.2 (V.I. 2013).

In both *Allen* and *United Indus., Svc.*, however, the Supreme Court expressly declined to decide the issue of the applicability of the FAA. As such, these opinions do not constitute binding precedent with respect to this issue. *See Allen*, 59 V.I. at 443 n.2 (“since Allen’s claim fails regardless of whether section 2 of the FAA preempts the VIWCA, we need not make this determination for the first time on appeal”); and *United Indus., Svc.*, 64 V.I. at 321 n.3 (“because the result would remain the same regardless of whether the FAA is applicable to this case, we decline to reach the issue as part of this appeal”).

In the absence of binding case law of the Supreme Court, the Superior Court remains bound to follow the precedent of the Third Circuit’s decision in *Gov’t of the V.I. v. United Indus. Workers, N.A.*, 169 F.3d 172 (3d Cir. 1999) (holding that “the provisions of the FAA and the standards developed by our jurisprudence in reviewing arbitrations under the FAA are enforceable in the Territorial Court”).⁴ *See Prentice v. Seaborne Aviation*, 2016 V.I. LEXIS 127, at *9, n.2 (V.I. Super. Ct. 2016). The Third Circuit’s decision in *United Indus. Workers*, upon which both *Allen* and *United Indus., Svc.* purportedly rely, confirms that “in order for the FAA to apply in the [Superior] Court, the arbitration at issue must affect interstate commerce as defined by *Allied-Bruce*.” *United Indus.*

⁴ The *United Indus. Workers* case originated in the Superior Court, was first appealed to the Appellate Division of the District Court, and finally appealed to the Third Circuit Court of Appeals, sitting as the *de facto* court of last resort for the Virgin Islands. As such, until the Supreme Court expressly holds otherwise, this Court is bound by the decision. *See Najawicz v. People of the V.I.*, 58 V.I. 315, 327-28 (V.I. 2013) (explaining that Third Circuit decisions in which that court was sitting as the “*de facto* court of last resort in the Virgin Islands” are binding upon the Superior Court even though they would only represent persuasive authority if the Supreme Court of the Virgin Islands were to consider the issue). The Third Circuit’s decision in *United Indus. Workers* minimally discusses and endorses the applicability of the FAA to courts in the Virgin Islands by way of 1 V.I.C. § 4, which has since been implicitly repealed. *See, e.g. King v. Appleton*, 61 V.I. 339, 349 (V.I. 2013). Decisions of the Third Circuit based upon “mechanistic and uncritical reliance” on 1 V.I.C. § 4, even when decided in that Court’s capacity as the *de facto* court of last resort for the Virgin Islands, do not constitute binding precedent in the courts of the Virgin Islands. *See, Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 396 (V.I. 2014). However, *United Indus. Workers* only discussed 1 V.I.C. § 4 in the context of reviewing the decision of the Appellate Division, while its decision is based solely on the requirements of the FAA itself, as interpreted by the Supreme Court of the United States. As such, Third Circuit’s decision in *United Indus. Workers* constitutes binding precedent in the Superior Court. The Supreme Court of the Virgin Islands itself has characterized the Third Circuit’s decision as finding that “the Federal Arbitration Act (‘FAA’) *simultaneously applies* to civil actions in Virgin Islands local courts through the Restatement (Second) of Contracts § 345(f), made applicable through section 4 of title 1 of the Virgin Islands Code, and section 2 of the FAA, which the United States Supreme Court has construed as preempting certain state and local laws inconsistent with the FAA.” *World Fresh Mkt. v. P.D.C.M. Assocs., S.E.*, 2011 V.I. Supreme LEXIS 29, at *4 (V.I. 2011) (emphasis added).

Workers, 169 F.3d at 176. The Third Circuit reviewed the scope of the interstate commerce nexus, resting upon precedents of the Supreme Court of the United States in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (upholding applicability of FAA to the states and territories of the United States) and *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) (establishing that the scope of the FAA is coextensive with the full breadth of Congress' regulatory power under the Commerce Clause). The Court echoed the Supreme Court's opinion in *Allied-Bruce*, explaining that this broad, expansive understanding of the scope of the FAA furthers the fundamental purpose of the FAA to overcome judicial hostility to the enforcement of arbitration agreements by placing arbitration clauses on equal footing with other contractual provisions. *United Indus. Workers*, 169 F.3d at 176; *see also Allied-Bruce*, 513 U.S. at 275 ("a broad interpretation of this language is consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms").

The Third Circuit's language in *United Indus. Workers* is instructive to our review here:

While it is true that in this case the record is scant as to an interstate nexus, we recognize that the appellee United Industrial Workers of North America, Seafarers International Union, AFL-CIO itself, which represents Acker, is an international body embracing Union workers not only in the various states of the union, but in foreign countries as well. Its activities, by their very nature, qualify as having an interstate nexus. Moreover, we can take judicial notice that the Attorney General's office of the Virgin Islands, of which Acker was a member until his termination, has been and is involved with matters concerning the various states... Although we recognize that the individual employment contract... can be construed narrowly as an employment contract of a local nature only, we are not persuaded that the character of his union, which negotiated the CBA, which sought to enforce the CBA, and which filed the grievance on behalf of Acker, and the nature of Acker's employment can be overlooked in determining whether the necessary interstate nexus for application of the FAA is present.

Id. at 176-77.

The CBA here is made between the Virgin Islands Department of Education and Locals 1825 and 1826 of the American Federation of Teachers, AFL-CIO. *See* Complaint, Exhibit A, at 3, 4.⁵ As in *United Indus. Workers*, the individual employment positions of Grievants performing work for

⁵ AFT is a national union with 1.6 million members in more than 3000 local affiliates throughout the United States and its territories, including the local affiliates, Defendant herein. *See* www.AFT.org. The Court takes judicial notice of the facts that: DOE is one of the largest departments of the Government of the Virgin Islands; that it actively recruits its teachers and staff (AFT members) from the United States mainland and foreign countries; that the vast majority of its educational equipment, supplies and materials (e.g. textbooks, computers, furnishings, etc.) are not products of the Virgin Islands; and that its annual budget is dependent upon tens of millions of dollars in grants and funding contributed by the federal government.

DOE wholly within the Virgin Islands might arguably be construed narrowly as being purely local in nature. Yet, the CBA itself inherently involves interstate and international commerce. Accordingly, that nature of that contract, viewed in the context of applicable, binding case law defining the scope of the FAA as coextensive with the full breadth of Congress' regulatory power under the Commerce Clause, compels the Court to find that the FAA is applicable to disputes arising under the parties' CBA; a "contract evidencing a transaction involving commerce." FAA § 2.

DOE's action is barred by the limitation period of FAA § 12

The Supreme Court has held that the FAA § 12, to the extent that it applies to disputes in the Virgin Islands, "does not establish a jurisdictional requirement, but operates as a statute of limitations that may be waived by a party's failure to timely assert it." *Allen v. Hovensa*, 59 V.I. at 436.⁶ Here, AFT timely asserted this defense in its Motion; its first pleading responsive to DOE's Complaint.

Section 12 requires that a party seeking to vacate an arbitration award must serve notice of its motion to vacate upon the adverse party within three months after the award is filed. Here, the Award was filed October 1, 2013; DOE filed its Complaint in Superior Court December 20, 2013; but DOE served no notice on DOE of its action to vacate the Award until it served process on AFT's representative on February 7, 2014. The three month period of the statute expired some five weeks prior to service of notice on AFT by DOE. As such, failing any tolling of the statutory period, the untimely service of notice of the Complaint mandates its dismissal. *Id.*⁷

DOE does not contend that AFT was notified of its action within three months, but rather argues that it should not be sanctioned with dismissal for an alleged administrative error of the Clerk

⁶ Courts within the Virgin Islands have consistently applied Section 12 of the FAA in adjudicating actions to vacate arbitration awards. *See, e.g., Gov't of the Virgin Islands v. AFT, Local 1825*, 66 V.I. 34, 45 (V.I. Super. Ct. 2014); *Mustafa v. Amore St. John, LLC*, 58 V.I. 74, 88-89 (V.I. Super. Ct. 2013); *Thompson v. World Fresh Mkt., LLC*, 2011 V.I. LEXIS 39, at *5-6 (V.I. Super. Ct. July 15, 2011); *Gov't of the Virgin Islands v. United Indus., Svc. Transp., Prof. & Gov't Workers of N.A. Seafarers Int'l Union*, 55 V.I. 440, 447 (V.I. Super. Ct. 2011).

⁷ Unlike the vast majority of states, the Virgin Islands has no statutory framework governing arbitration. Most jurisdictions have enacted laws, many based upon the FAA, to supplement the FAA or, where some or all of the FAA is not applicable, to provide an independent framework for the governance of arbitral proceedings. *See, e.g., DEL. CODE ANN. TIT. 10, § 5701 et seq.* (LexisNexis 2016) (Uniform Arbitration Act); 710 ILL. COMP. STAT. ANN. 5/1 *et seq.* (LexisNexis 2016) (Uniform Arbitration Act); TEX. CIV. PRAC. & REM. CODE, TIT. 7 (LexisNexis 2016) (Alternate Methods of Dispute Resolution); N.Y. C.P.L.R. ART. 75 (LexisNexis 2016) (Arbitration); FLA. STAT. ANN. CHAP. 44 (LexisNexis 2016) (Mediation Alternative to Judicial Action). In the event that the FAA were deemed inapplicable, in the absence of specific statutory provisions relative to arbitration in the Virgin Islands, DOE's Complaint herein would presumably be governed by general limitations for filing and service of civil actions, such that the limitation period for the filing of DOE's Complaint would be 10 years, as "an action for any cause not otherwise provided for in this section." 5 V.I.C. § 31(2)(A).

of the Superior Court.⁸ No explanation is provided for the delay between DOE's filing its Complaint and the processing of the Summons by the Superior Court. Nonetheless, service of process on AFT was timely accomplished pursuant to applicable Fed. R. Civ. P. 4(m). DOE does not contend that it took any steps provide notice to AFT of its Complaint to vacate the Arbitrator's Award within the three month period mandated by FAA § 12. Rather, DOE relies upon the fact that the Complaint was timely filed, twelve days prior to the expiration of the deadline, stating that Super. Ct. R. 24 imposes the "burden and mandatory duty" on the Clerk of the Superior Court to issue and deliver the Summons. Opposition, at 2.⁹

However, while Rule 24 provides that the Clerk shall "seal and issue" process, the Rule imposes no burden upon the Clerk to deliver process to the defendant. Superior Court Rule 27(b) states that "summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure."¹⁰ In turn, Federal Rule 4(c)(1) relative to service of a summons states: "A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served." That is, contrary to DOE's assertions, in the context of the required service of summons and complaint in a civil action, neither Superior Court Rules 24 and 27, nor Federal Rule 4(c) relieves a plaintiff of the obligation to effectuate service of process. Likewise, in the context of the required service on the adverse party of notice of an action seeking vacatur of an arbitration award under FAA § 12, DOE has failed to present any rule or authority suggesting that the burden of effectuating that service should be shifted from the party seeking relief to the Superior Court or anyone else.

Without so stating, DOE implicitly seeks a ruling that the three month period for service of the notice under Section 12 should be tolled until February 7, 2014, the date that AFT was served with process. DOE cites no binding authority to support its contention that the notice period should be extended and that dismissal is not warranted. Instead, DOE compares the purported "administrative error" of the Superior Court Clerk to an allegedly analogous scenario in Montana. Yet, as presented,

⁸ DOE states: "Due to no fault of the Government, the Summons was executed by the Acting Clerk of Court Estrella George, on January 31, 2014. Thereafter, by no fault of the Government, Defendants were served February 7, 2014." Opposition, at 1.

⁹ Superior Court Rule 24 provides: "Upon the filing of the complaint, the clerk shall forthwith seal and issue the original process, except as otherwise provided by statute."

¹⁰ Consistently, 4 V.I.C. § 82(c) states: "Summonses, complaints and subpoenas shall be served in the same manner as summonses are required to be served by Rule 4 of the Federal Rules of Civil Procedure."

the decision of the Montana Supreme Court is not analogous. There, the clerk of the court failed to perform the “mandatory duty of issuing *and delivering* a summons... which is clearly required under the Rule and is solely within that official’s responsibility.” *Id.* at 2 (citing *Busch v. Atkinson*, 925 P.2d 874, 878 (Mont. 1996)) (emphasis added). Here, unlike under the Montana Rules of Civil Procedure, delivery by the Clerk of the Summons is not required by any applicable Rule of the Superior Court. Rather, the Clerk performed her mandatory duty to seal and issue process. Responsibility for delivery of the notice of the action to vacate the Award rests with DOE, as with service of process of a civil action, and is not, as DOE contends, “solely within [the Clerk of the Court’s] responsibility.”

In a factually similar case from the District Court for the Middle District of Florida, the applicant for vacatur of an arbitration award timely filed its application, but failed to serve the opposing party within three months, as required by Section 12 of the FAA. *Belz v. Morgan Stanley Smith Barney, LLC*, 2014 U.S. Dist. LEXIS 28906 (M.D. Fla. 2014).¹¹ There, the District Court noted that the applicant

fail[ed] to cite to any authority in support of applying an equitable exception to the FAA’s limitations period, and the Court questions whether any such exception exists. *See Taylor v. Nelson*, 788 F.2d 220, 225-26 (4th Cir. 1986) (“The existence of any [due diligence or tolling] exceptions to § 12 is questionable, for they are not implicit in the language of the statute, and cannot be described as common-law exceptions because there was no common-law analogue to enforcement of an arbitration award.”); *Waveform Telemedia, Inc. v. Panorama Weather N. Am.*, 2007 U.S. Dist. LEXIS 15626, 2007 WL 678731, at *5 (S.D.N.Y. Mar. 2, 2007)... [e]quitable tolling typically requires some affirmative misconduct, such as fraud, misinformation, or deliberate concealment.

Id. at * 25. *See also Domnarski v. UBS Fin. Servs.*, 919 F. Supp. 2d 183, 186-187 (D. Mass. 2013) (finding that plaintiff’s motion to vacate filed three days late was untimely under Section 12 of the FAA and, without deciding whether the equitable tolling doctrine applied, determined that the plaintiff had not set forth any grounds for its application).¹²

The decisions of those federal courts questioned the availability of equitable tolling under FAA § 12 to an applicant for vacatur of an arbitration award. Based upon guidance of our Supreme

¹¹ “It is undisputed that the Trustee did not effect service of the Application to Vacate on [defendant] until May 17, 2013, four days after the May 13, 2013 service deadline.” *Belz*, 2014 U.S. Dist. LEXIS 28906, at *20.

¹² The District Court decided that the plaintiff’s situation was not one where “there were ‘extraordinary circumstances’ beyond Plaintiff’s control or in which she was materially misled into missing the deadline. ... Quite to the contrary, Plaintiff (and her attorney) had more than adequate time to file the instant motion but failed to do so.” *Domnarski*, 919 F. Supp. 2d at 187.

Court relative to statutes of limitations generally, we assume, without deciding, that equitable tolling is available in the Virgin Islands to a party seeking to vacate an arbitration award. We need not determine that issue here, however, because the circumstances of DOE's failure to meet the notice deadline do not justify tolling the statutory deadline.

The Supreme Court guides that "extraordinary circumstances warranting equitable waiver of a deadline may exist if an agency 'has intentionally or negligently failed to perform its ministerial duties to such an extent' that a timely initiated appeal was not possible." *Thomas v. V.I. Bd. of Land Use Appeals*, 60 V.I. 579, 589 (V.I. 2014) (finding that the appellants failed to present any evidence that they diligently pursued their rights to file a timely petition for writ of review) (quoting *In re Rogers*, 56 V.I. 618, 627-28 (V.I. 2012)).

Here, the burden rested with DOE to timely serve notice on AFT of its action to vacate the October 1, 2013 Arbitrator's Award. DOE filed its Complaint in the Superior Court on December 20, 2013, twelve days before the expiration of Section 12's three month deadline within which to serve on AFT notice of its action. Yet, rather than delivering to AFT and/or its counsel a copy of its Complaint when filed, DOE did nothing, relying instead upon the Clerk of the Superior Court to provide notice to AFT. AFT received notice of DOE's action when it was served with process on February 7, 2014; five weeks after the deadline for service of the notice had passed.

DOE has failed to present an argument sufficient to warrant equitable tolling of the statutory deadline for service of notice on AFT that it sought to vacate the Arbitrator's Award. DOE's allegation of "administrative error" of the Clerk of the Superior Court rings hollow. No rule or statute requires the Clerk to serve notice of the action on the adversary of an applicant for vacatur of an arbitration award. That burden rests squarely upon the party seeking to vacate such an award. DOE has alleged no affirmative misconduct of the Clerk, nor any other circumstances that could possibly justify the "extraordinary remedy" of equitably tolling the statutory deadline for service of notice.

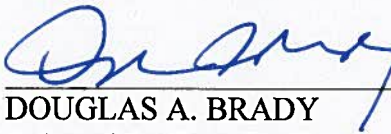
It is worth noting that this decision does not deny DOE the opportunity to be heard relative to the grievances of the AFT members. Indeed, the parties have already fully adjudicated their dispute through the contractually agreed medium of arbitration. As such, justice has not been denied DOE, and AFT's Rule 12(b)(6) Motion to Dismiss will be granted.

In light of the foregoing, it is hereby

ORDERED that Defendant's Motion to Dismiss is GRANTED. It is further

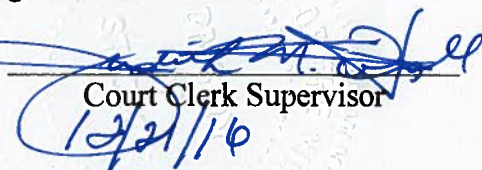
ORDERED that Plaintiff's Complaint is DISMISSED.

DATED: December 21, 2016.


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor
12/21/16